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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 155

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BESSIE MATHEWS and LAVON KELLEY
Petitioners
v.
STATE OF WEST VIRGINIA, EX REL.
LORENTZ C. HAMILTON,
Prosecuting Attorney of Calhoun County
Respondent

■

Petition for Writ of Certiorari to the Circuit Court of Calhoun County of the State of West Virginia

HAYDEN C. COVINGTON
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PROSECUTING ATTORNEY OF CALHOUN COUNTY

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Petition for Writ of Certiorari to the Circuit Court of Calhoun County of the State of West Virginia

To the SUPREME COURT OF THE UNITED STATES:

Bessie Mathews and Lavon Kelley, petitioners, present this their petition for writ of certiorari and show unto the Supreme Court as follows:

A

Summary Statement of Matters Involved

1. *Statutory Provision Sustaining Jurisdiction.*

Section 237(b) of the Judicial Code [28 U. S. C. A. 344(b)] sustains jurisdiction of this Court.

2. *Validity of State Law Drawn in Question.*

Neither a state statute nor an ordinance of a municipality is involved in this case. There is presented for review

a decree of the Circuit Court granting an injunction restraining petitioners from distributing the *Watchtower* and *Consolation* magazines and other Biblical literature upon the streets of Grantsville, West Virginia, and from orally teaching, preaching and maintaining the beliefs of Jehovah's witnesses publicly. The decree reads as follows:

> "This cause came on this day to be heard upon the plaintiff's bill and exhibits therewith filed, process to answer said bill having been duly and legally served upon the said defendants more than thirty days prior to this date, to-wit, on the 14th day of March, 1942, cause regularly proceeded in and set for hearing at the Rules, upon the joint replication to said answer, upon the depositions of witnesses duly taken, subscribed, sworn to and filed on behalf of the plaintiff and the said defendants, and was argued by Counsel.
>
> "Upon consideration whereof, the Court is of the opinion that the said plaintiff is entitled to the relief prayed for in its said bill, which opinion has been given in writing and duly filed herein, and it is adjudged, ordered and decreed accordingly.
>
> "It is therefore adjudged, ordered and decreed that the injunction, heretofore awarded temporarily by the Honorable S. O. Prunty, Judge of the Third Judicial Circuit of this state, be and the same is hereby perpetuated, and that the said defendants, Bessie Mathews and Lavon Kelley, be and they are hereby perpetually injoined, restrained and inhibited from selling, distributing and circulating the books, pamphlets, magazines and other papers, in the bill and proceedings herein fully mentioned and described in and upon the public places of Calhoun county and from orally teaching, preaching and maintaining the tenets and creeds, fully set forth and described in the said bill and proceedings, in and upon said public places in said county.

"It is further adjudged, ordered and decreed that the said defendants do pay to the plaintiff all its costs about its suit in this behalf expended, including a statutory docket fee of twenty dollars.

"Upon motion of the plaintiff, it is further adjudged, ordered and decreed that the Court's said written opinion, so filed herein, be and the same is hereby made a part of the record in this suit.

"And this cause being ended, it is ordered that the same be stricken from the docket." R. 86-87.

3. *Date of Judgment and Order to be Reviewed.*

The decree perpetually enjoining petitioners from distributing literature upon the streets of the city of Grantsville was entered upon November 16, 1942. (R. 86) The decree became final on March 15, 1943, on which date the Supreme Court of Appeals of West Virginia refused petitioner's third application for appeal. The appellate court for the first time refused the application because "the decree complained of is plainly right". (R. 94-96) The first application for appeal was refused on February 8, 1943. (R. 87-88) A second application for appeal was refused by the Supreme Court of Appeals of West Virginia on March 1, 1943. (R. 94) These two applications for leave to appeal did not make the decree of November 16, 1942, final under the procedure of the State of West Virginia.[1]

In the case of *Blumberg* v. *Snyder,* 90 W. Va. 145, 148-149, the Supreme Court of Appeals of West Virginia said:

"The appellate jurisdiction of this court in civil matters is limited. . . . A refusal to grant the prayer of a petition in error is ordinarily not final; within the

[1] "In a case wherein the court shall deem the judgment, decree or order complained of plainly right, and reject it on that ground, no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court when in session."—Sec. 5795 of West Virginia Code Anno. [Art. 5, Sec. 9 of West Virginia Code (1931)]

statutory time allowed, for appeal or error, the petition may be again presented. It is reasonable to suppose that a court once having refused error would not likely consider another application. But there would be nothing to prevent. The term of the judge so refusing may end and his successor inducted into office before limitation of time for error. His action on another application may grant the writ. The statute quoted makes the order refusing error final when the judge deems the judgment or order of the Court of Common Pleas plainly right, and so states, and in terms prescribes that no further petition shall afterwards be presented for the same purpose. . . . It may be observed that refusal of application to this court for appeal or error is not final, and the application may be renewed before limitation expires unless the court deems the judgment, decree or order complained of plainly right and rejects it on that ground. Chap. 135, Sec. 11, Code."[2]

The West Virginia Code provides that the time limitation for appeal or error from the Circuit Court to the Supreme Court of Appeals of West Virginia is eight months.[3] The practice required the petition to be renewed or else wait until expiration of the eight months' limitation period before it became final.

This Court requires a litigant to exhaust all possible remedies in the appellate machinery of the state courts before applying to this Court for relief.[4] A remedy remained open during the eight-month period to make subsequent applications until the decree was declared to be plainly right.

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[2] 2 *Williams* v. *Irvin*, 101 W. Va. 708; *Moore* v. *Johnson*, 24 W. Va. 549; *Truslow* v. *Payne*, 90 W. Va. 149; *State of West Virginia* v. *Corbin*, 117 W. Va. 241, 243.

[3] Art. 5. Sec. 4, West Virginia Code (1931), Sec. 5811 West Virginia Code Anno.

[4] *Gorman* v. *Washington Univ.*, 316 U. S. 98, 101; *Osment* v. *Pitcairn*, (No. 140, October Term 1942) 63 S. Ct. 21; *Tenner* v. *Dullea*, 314 U. S. 692.

Under the doctrine of this Court announced in *Department of Banking* v. *Pink*, No. 466 October Term 1942, 63 S. Ct. 233, it is clear that petitioners were required to apply repeatedly to the Supreme Court of Appeals of West Virginia until that court certified that the judgment was "plainly right". In *Department of Banking* v. *Pink*, supra, this Court said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (Wick v. Superior Court, 278 U. S. 575; Cheltenham & Abbington Sewerage Company v. Pennsylvania Public Utility Comm., 317 U. S. ...., decided October 12, 1942), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and *that that adjudication is not subject to further review by a state court.*"

It is plain that under the West Virginia procedure all possible remedies for appeal in the appellate machinery in the Supreme Court of Appeals of West Virginia could not have been completely exhausted until the eight months limitation for appeal had expired, unless and until the appellate court entered a final decree refusing appeal by a certifying that the decree was "plainly right". Such order so certifying was not entered until March 15, 1943. On that date the decree became final. It was not ripe for certiorari until then.

Petitioners applied for extension of time for filing a petition for certiorari which was granted and time was extended to include July 15, 1943. The order extending time provided: "without at this time passing on the question of whether application for this extension is timely." (R. 96) If the three months in which to apply for extension or file for petition for certiorari begins to run on the date of the first order refusing appeal, the application for extension of time may not be timely; but if the time runs from March

15, 1943, the date that the appeal was refused because the decree was "plainly right", the application was, without doubt, timely.

Assuming that this Court will apply its own rules as to when the decree of the Circuit Court became final and hold that the time began to run from the date of the first order refusing appeal, we still insist that, under the rule applied by this Court, the application for extension of time and the filing of the petition for certiorari herein have been timely presented, under the doctrine of this Court in reference to motions for rehearing.[5] The reason is that the fact that the Supreme Court of Appeals entertained the subsequent applications renews the beginning of running of time for application for *certiorari.*

The Supreme Court of Appeals of West Virginia actually entertained three applications for appeal, all of which were presented within the eight-month period of limitation, the latest one being presented March 15, 1943. That court recognized that, for the purpose of appeal to this Court, the decree did not become final until March 15, 1943. That court granted a three months' stay from March 15, 1943, the date of its *final* decree, in which to allow petitioners to apply for a writ of certiorari. (R. 95) Therefore time for applying to this Court runs from the date of the appellate court's final order certifying that the decree of the Circuit Court was "plainly right". March 15, 1943, fixed the date when the finality of the judgment for purposes of review is established, and the three months' time for applying to this Court began to run.

The time for filing petition for certiorari expires July 15, 1943. The petition is filed within such time.

4. *Circuit Court Highest Court in which a Decision Could be Had.*

The decree of the Circuit Court was subject to discre-

[5] *City Bank of Michigan City, Ind.*, v. *Opperman*, 249 U. S. 448, 450; *Zimmerman* v. *United States*, 298 U. S. 167; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498.

tionary review by the Supreme Court of Appeals of West Virginia. Petitioners sought to invoke this discretionary power. The appellate court refused to exercise its power of review and the decree of the trial court is the decree of the highest court of the state in which a decision could be had within the meaning of Section 237(b) of the Judicial Code. The petition for writ of certiorari therefore issues to review the decree of the Circuit Court of Calhoun County, West Virginia.[6]

5. *Time and Manner in Which Questions Raised Below.*

By motion to dismiss the injunction, the petitioners urged that the injunction denied them their rights "to distribute literature and to teach the scriptures as they were doing under both the federal and state constitutional guarantees of religious freedom, freedom of the press, and personal liberty." R. 8-9.

In their answer, petitioners alleged that "all their acts are and have been lawful and proper and protected by state and national constitutional guarantees of freedom of religion, freedom of the press, personal freedom and liberty under the First and Fourteenth Amendments of the U. S. Constitution, and Article III, Section 15, of the Constitution of the State of West Virginia. R. 12.

The trial court duly considered each of the federal questions thus presented and overruled same (R. 86-87) after hearing all the evidence. The trial court filed a written opinion giving his reasons for the decree. R. 82-86.

In the petition for appeal duly filed in the Supreme Court of Appeals of West Virginia, petitioners duly assigned error as follows: "That the court erred in denying by its decision the freedom of speech, freedom of the press, and freedom of religion guaranteed by the Constitution of

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[6] *Virginia Railway Co.* v. *Mullins*, 271 U. S. 220 [W. Va.]; *Kanawha & M. Ry. Co.* v. *Kerse*, 239 U. S. 576, 578 [W. Va.]; *Andrew* v. *Virginian Ry. Co.*, 248 U. S. 272.

the State of West Virginia and the Constitution of the United States of America." R. 93.

All of these various contentions were overruled by the Supreme Court of Appeals of West Virginia, thus approving the unconstitutional decree of the trial court. R. 87-88, 94-95.

6. *Opinions of the Courts Below.*

The Supreme Court of Appeals of West Virginia did not render and file opinions.

The Circuit Court of Calhoun County filed an opinion which is unreported. R. 82-86.

7. *Statement of Facts.*

From October 1941 to March 1942 (R. 69) petitioners, Jehovah's witnesses, (R. 57) had been engaging regularly, once each week, on Saturdays, in the distribution of the *Watchtower* and *Consolation* magazines upon the public streets of Grantsville, West Virginia, (R. 58-59, 69-70) a town of 1052 population, located in the northwestern part of the state. The distribution of the literature thus was for the purpose of preaching the Gospel of God's Kingdom. The literature related to the tenets and beliefs advocated by Jehovah's witnesses to be found in the Bible, and were distributed in furtherance of such. (R. 65-66) At no time did petitioners experience any opposition, difficulty or trouble in the distribution of this literature until March 7, 1943. (R. 63, 69, 70) The people were always friendly to petitioners as they distributed the literature. (R. 70)

The method of distribution employed by petitioners was to stand on the sidewalk at or near the curb and offer magazines on a small contribution to the pedestrians who passed. (R. 65, 69) Each wore a canvass bag strapped over her shoulders containing extra copies of the magazines. (R. 65) Each petitioner would hold a sample copy of each magazine in her hand and say to the passers-by, "Watchtower!" and "Consolation!" R. 65.

Neither petitioners had ever experienced any altercation with anyone at any time about the subject matter of the literature, religious beliefs, the flag salute question, or anything else. (R. 73) The undisputed evidence shows that at all times mentioned herein petitioners conducted themselves quietly, properly, kindly and courteously toward the pedestrians while distributing the literature. (R. 64, 65) The undisputed evidence shows that they were not truculent, were not offensive and did not annoy anyone at any time while distributing the literature. The record shows that they did not violate any law. The respondent admitted that they did not violate any law. Petitioners never assaulted anyone at any time. R. 55, 81.

On the occasion of March 7, 1942, Bessie Mathews and Lavon Kelley were distributing literature while standing along the sidewalk curbs on Main Street. Mrs. Mathews was standing in front of her husband's department store. (R. 63) Lavon Kelley was about 100 yards down the street near Gibson's store. (R. 66) A drunken man named Charter Shafer attacked Bessie Mathews while she was distributing the literature. (R. 59) Shafer's attack was unprovoked and unexpected. (R. 60, 61) Shafer and other persons of the town had become opposed to Jehovah's witnesses because they do not salute the flag. (R. 27, 30, 32, 37, 49) Shafer felt that petitioners should not be allowed to distribute literature upon the streets and attempted to cause it to be stopped. (R. 16) He consulted the Mayor and insisted that something be done to stop the distribution of the literature. (R. 16, 33) The Mayor advised Shafer that nothing can be done, that there was no ordinance prohibiting petitioners' activity. (R. 30-33) Shafer returned to Main Street in an intoxicated condition (R. 59-60), and in a loud, angry voice, cursed and abused Bessie Mathews, "using terrible language." He accused her of being un-American and jerked the magazines out of her hand, destroyed the literature and shoved her off the sidewalk into the street.

Each time she attempted to get back on the sidewalk, he would repeatedly push her off. (R. 59) He stayed near by for some time, yelling, cursing and abusing her, then approached a man on the street and tried to bribe him by offering him $5.00 to put Bessie Mathews off the streets. (R. 59-60) Shafer then ran to the middle of the street and accosted an attorney, Louis Reed, who was crossing the street, and demanded that Reed do something about Mrs. Mathews, "in a rather loud tone of voice and while the conversation between Mr. Shaffer and myself (Reed) took place quite a large crowd collected about us. When Mr. Shaffer left me that crowd followed in behind him." (R. 24, 28) Reed advised Shafer, "I am a lawyer, I am not the law." Shafer said, "I will kill her—the son of a bitch" as he approached her again with the crowd following him. Shafer said to Mrs. Mathews, "You go back to Japan or Germany, where you belong." Bessie Mathews' son, Bill, was standing near by and saw Shafer approach his mother the second time—was standing behind her—and stepped up, and as he did so, Shafer raised his arm and struck young Mathews, who struck back and hit Shafer. Petitioner's son grappled with Shafer and was able to pin him down to the ground for some time. Later they were separated and Shafer got up and left. (R. 60) The crowd soon dispersed. Shortly thereafter Shafer returned and struck Bessie Mathews with his fist on the left jaw knocking her down and her head hit the curb. Shafer then ran across the street and some people picked her up and carried her into her husband's store. (R. 60)

At no time did Bessie Mathews provoke Shafer to attack. (R. 61, 74) No crowd had gathered prior to the time that Shafer arrived on the street near Mrs. Mathews. (R. 61) While Shafer was disturbing the peace, violating the law, making a loud noise and assaulting the petitioner Mathews, a large crowd gathered, estimated by Mrs. Mathews to be 25 (R. 59-61) and other persons estimated

the crowd ranging from 50 to 250. (R. 17, 23, 36, 39, 47, 75) The undisputed evidence shows, therefore, that petitioners did not cause any crowd to congregate at anytime. The only time that a crowd congregated while they were distributing the literature on the streets was on the occasion when Shafer caused the disturbance resulting in the congregation. The crowds dispersed quickly after Shafer had left the scene.

8. *Bill of Complaint and Findings of Court.*

Based upon the foregoing evidence, the Bill of Complaint praying for an injunction was filed. Respondent's Bill alleged that petitioners herein were Jehovah's witnesses; that Jehovah's witnesses taught that it was wrong and sinful to pay respect, honor or obeisance to the flag by saluting the flag; the distribution of the literature in the manner above described; that such distribution caused crowds to gather so as to impede and halt public traffic; that the distribution of the literature constituted "unpatriotic and treasonable acts; that the distribution of the literature constituted a public nuisance in that the activity endangered the "peace, unity and security of the town and county and the people generally", and "the ability of the people and said public to aid the government in the present emergency"; that unless enjoined, said activity would result in great harm and injury to the people of the state; that there are no criminal statutes of West Virginia and no criminal ordinances of Grantsville which would prohibit the activity; that "the plaintiff does not allege that the said defendants have been guilty of any crime against the state or town, or that said acts are crimes per se." R. 2-5.

On March 13, 1942, the trial court issued a temporary injunction without notice and without bond restraining petitioners from the distribution of said literature. R. 5-6.

The opinion of the trial court recites some of the foregoing facts and the trial court then says:

"In reviewing the record in this case an amazing situation is revealed in the testimony of the defendant Bessie Mathews. On page 17 of the testimony filed on behalf of the defendants, counsel for the plaintiff propounded to her the following question:

"Q. 17. 'You and your organization then do believe and teach that it is improper and sinful and wrongful for you and the members of your organization to give salute to the flag?'

To this she answered:

'Yes. sir.'

Then counsel propounded the further question:

"And the literature so distributed by you as alleged in the bill also teaches that doctrine, does it not?"

To this question she answered:

"Yes, because that is what the Bible teaches."

From this testimony it is not difficult to understand that the defendants have passed from the stage of believing that the flag should not be saluted but were upon the public streets distributing literature to gather support to their view. Hence, it at once appears that freedom to believe as you please is translated into action to encourage others to adopt the same notions. Again it must be submitted that there is no law in this state prohibiting any citizen from entertaining any belief he may adopt but he may not have the right to openly proclaim his beliefs in public places. In other words Jehovah's Witnesses may believe it sinful and improper to salute the flag of our country but they have no right to create disrespect for it upon the part of others. This very question has given rise to many controversies and resulted in many judicial decisions throughout the entire country not in harmony with

each other. These decisions concern largely statutes and regulations requiring salutes to the flag in public schools. Even the Supreme Court of the United States is in a doubtful position upon this matter although several cases have been presented and decided by it.

"The present case does not relate to requiring salutes, it involves a much broader question. Do the defendants have the right to go about the streets teaching orally and by distributing literature that it is sinful and wrongful to salute the American Flag? If so this same right is possessed by every person in the land. Can we say that such conduct may be protected and shielded under the cloak of religious freedom? If an act is unlawful or illegal it does not become legal because practiced by a member of a religious order. The right to believe a thing does not carry with it the right to proclaim and publish that belief without engendering the wrath of the law.

"A provision of the West Virginia Code, Chapter 61, Article 1, section 8, among other things provides: 'Any person . . . who shall publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by words or acts upon any such flag . . . shall be guilty of a misdemeanor . . . ' This provision indicates the policy of the state with respect to casting contempt by words or acts upon our flag. There can be no doubt that refusal to salute the flag does not confer the privilege of persuading others to hold it in contempt.

"My conclusion of this whole matter is that the defendants have no right to use public streets to teach disrespect for the American Flag. This they have done by the admissions of one of them. Not only this but according to numerous witnesses in the cause traffic has been impeded, hindered and delayed upon a state highway because the defendants were there selling and

distributing their literature. No organization possesses this right over the objection of the state. Of course the defendants have the right to sell and distribute free unobjectionable literature, subject to reasonable regulations, but it is unreasonable to believe that the literature distributed by them does not offend against the policy of this state. As long as the literature is confined to religious subjects there is no just cause of complaint, but teaching disrespect for the flag upon public streets is not a religious duty.

"At the present time we are engaged in a great world conflict. Notice is taken of the fact that thousands of men and many women are now engaged in this unparalleled struggle to preserve certain freedoms long cherished by the American people and other civilized nations of the world. Must we submit to practices on the home front which tend to create disrespect for the government whose protection we enjoy? May it be said of us that while our men fight abroad to preserve our country we permit conduct at home calculated to weaken, if not destroy, the very liberties they seek to preserve? In an emergency such as this we cannot and we must not temporize with any conduct tending to disorganize or destroy our unity. Contempt for the American Flag is such an act—all teaching designed to foster or promote such contempt should and must be suppressed.

"An injunction will be perpetuated preventing these practices upon the part of the defendants." R. 84-86.

The conclusion of the court below concerning the facts is based entirely upon the allegations of the plaintiff-respondent and not supported in any way by any of the evidence. The conclusions are contrary to the overwhelming preponderance of the evidence. The opinion is based upon a pure fiction of fact and law.

B

Questions Presented

By reason of the foregoing, there were seasonably presented to the courts below and there are now presented to this Court for review substantial federal questions as follows:

1. Was the trial court justified in granting a final decree of injunction restraining petitioners from exercising their lawful constitutional rights of freedom of speech, freedom of press and freedom to worship ALMIGHTY GOD through distribution of the literature in question?

2. Does the final decree of the trial court, as applied to the evidence, abridge and deny petitioners of their rights of freedom of speech, freedom of press and freedom to worship ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution?

3. Can the right to exercise the foregoing freedoms guaranteed by the First and Fourteenth Amendments to the United States Constitution be restrained by injunction because of dissociated acts of past violence or merely because the activity may provoke violence in others who are the law violators?

4. Is the injunction, not confined to restraining acts of violence, so sweeping in its terms so as to deny to petitioners their rights guaranteed by the First and Fourteenth Amendments to the United States Constitution?

C

Reasons Relied on for Allowance of Writ

This petition for writ of certiorari should be granted in the sound discretion of this Court because there are special and important reasons therefor. The Circuit Court of Calhoun County, West Virginia, has decided a federal

question of substance in a way not in accord with and directly contrary to applicable decisions of this Court.[1]

The Circuit Court of Calhoun County, West Virginia, has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision to correct the same.

WHEREFORE, your petitioners pray that this Court issue a writ of certiorari to the Circuit Court of Calhoun County, West Virginia, directing such court to certify to this Court for review and determination on a day certain to be named, a full and complete transcript of the record and all proceedings in the case as numbered and titled on the docket of said court; and that the decree of said court be reversed and the complaint ordered dismissed and that the petitioners have such other and further relief in the premises as to this Court may seem just and proper in all the circumstances.

BESSIE MATHEWS
LAVON KELLEY
Petitioners

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[1] *Near* v. *Minnesota*, 283 U. S. 697, 721-722; *Milk Wagon Drivers Union, etc.* v. *Meadowmoor Dairies*, 312 U. S. 287, 293-299; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Taylor* v. *Mississippi*, No. 826, October Term 1942 [June 14, 1943]; *West Virginia State Board of Education* v. *Barnette et al.*, No. 591, October Term 1942 [June 14, 1943]

SUPREME COURT OF THE UNITED STATES

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STATE OF WEST VIRGINIA, EX. REL.
LORENTZ C. HAMILTON,
PROSECUTING ATTORNEY OF CALHOUN COUNTY

■

SUPPORTING BRIEF

Specification of Errors

The petitioners assign the following errors in the record of proceedings of said cause:

The Circuit Court of Calhoun County, West Virginia, committed fundamental error in issuing the perpetual injunction restraining petitioners in the manner described because

1) The undisputed evidence showed that petitioners were exercising their constitutional rights in a lawful and proper manner and the decree denied petitioners of their rights of freedom of speech, press and worship of ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution.

2) The undisputed evidence showed that the petitioners were neither guilty of committing acts of violence nor causing acts of violence to be committed and the dissociated acts of past violence by third persons violating the laws of West Virginia against petitioners were not grounds for

restraining petitioners from their lawful and constitutionally protected activity.

3) The decree was not confined to restraining acts of violence but broadly included the lawful activity of petitioners contrary to the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

The undisputed evidence shows that in all the months that petitioners repeatedly distributed literature on Saturday afternoons upon the streets of Grantsville, there was only one occasion of any difficulty whatsoever. That arose and was due solely to the unlawful, unprovoked and malicious attack of Charter Shafer, who was intoxicated at the time. By his loud, boisterous, unruly, offensive and insulting conduct toward Bessie Mathews he caused a crowd to gather and disturbed the public peace. He violated the law. The lawless and law violators should be restrained by prosecution rather than enjoin the innocent ones. If this decree be sustained, then, why not enjoin the innocent bystanders? The evidence shows that no person threatened any injury or interference against petitioners personally except Shafer, a drunk.

On all other occasions, no crowd gathered about petitioners while they distributed the literature. There is no intimation or suggestion in the evidence that the traffic was at any time impeded or blocked by reason of a congregating of people about petitioners. On the occasion that the crowd gathered about petitioner Bessie Mathews when she was assaulted by Charter Shafer, the evidence shows that the crowd promptly dispersed when Shafer left.

The undisputed evidence shows that petitioners did not threaten to do violence against anyone. The respondent admits that petitioners had violated no law. There is no suggestion that petitioners were boisterous, loud, unruly

or offensive. They acted with propriety and had just as much right upon the public sidewalks as did any other person in the town of Grantsville.[8]

The evidence shows that petitioners sincerely tried to promote the welfare of the people by bringing to them the unadulterated Word of God. The message which they presented to the people of and concerning God's Kingdom, as the only hope for the world of mankind, was for the purpose of comforting all that mourn[9] in Grantsville. There is no contention that petitioners ever said or did anything against the best interests of the people of this nation. To the contrary it appears that they were sincerely trying to promote the eternal welfare, happiness, peace and security of the people. They were obeying the commands of Almighty Jehovah God, announced by Christ Jesus: "And this gospel of the kingdom shall be preached in all the world for a witness unto all nations; and then shall the end come."[10]

The activity of petitioners, Jehovah's witnesses, has been held by this Court repeatedly to receive the protection afforded by the shield of the First and Fourteenth Amendments to the United States Constitution.[11]

The principal objection to the activity of petitioners herein was that they believed that it was contrary to the law of Almighty God for *them* to salute the flag.[12]

The trial court bottomed the decree upon the assumption that such doctrines were contrary to public policy of the nation and presented a danger against the safety of the state if permitted to be made known. In *West Virginia State Board of Education* v. *Barnette et al.*, supra, this

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[8] *Jamison* v. *Texas*, 63 S. Ct. 669 [March 8, 1943]; *Schneider* v. *State* (Town of Irvington), 308 U. S. 147.

[9] *Isaiah* 61:2.

[10] *Matthew* 24:14; *Mark* 13:10.

[11] *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, supra; *Jamison* v. *Texas*, supra; *Largent* v. *Texas*, 63 S. Ct. 667 [March 8, 1943]; *Cantwell* v. *Connecticut*, supra; *Murdock et al.* v. *Commonwealth of Pennsylvania*, 63 S. Ct. 870 [June 14, 1943]; *Jones* v. *Opelika*, 63 S. Ct. 890 [June 14, 1943]; *Martin* v. *Struthers*, 63 S. Ct. 862 [June 14, 1943]; *Taylor* v. *Mississippi*, supra.

[12] *Exodus* 20:3-5.

Court held that it was beyond the power of the state to enact law to compel citizens to salute the flag. There the Court said: "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."

The issues presented in the case at bar are specifically disposed of by this Court in favor of petitioners, Jehovah's witnesses, in the case of *Taylor* v. *Mississippi*, supra, where the Court said:

> "The statute here in question seeks to punish as a criminal one who teaches resistance to governmental compulsion to salute. If the Fourteenth Amendment bans enforcement of the school regulation, *a fortiori* it prohibits the imposition of punishment for urging and advising that, on religious grounds, citizens refrain from saluting the flag. If the state cannot constrain one to violate his conscientious religious conviction by saluting the national emblem, then certainly it cannot punish him for imparting his views on the subject to his fellows and exhorting them to accept those views.
>
> "Inasmuch as Betty Benoit was charged only with disseminating literature reasonably tending to create an attitude of stubborn refusal to salute, honor, or respect the national and state flag and government, her conviction denies her the liberty guaranteed by the Fourteenth Amendment. Her conviction and the convictions of Taylor and Cummings, for advocating and teaching refusal to salute the flag, cannot be sustained."

Respondent argues that the doctrines believed by petitioners and the contents of the literature related to a subject matter that was provocative and was calculated to cause others to threaten a breach of the peace and to do

violence against petitioners. This argument was specifically disposed of by this Court in *Murdock et al.* v. *Pennsylvania,* supra, where the Court said:

> "Considerable emphasis is placed on the kind of literature which petitioners were distributing—its provocative, abusive and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. See *Douglas* v. *City of Jeannette,* concurring opinion, decided this day. But those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights."

In determining this issue, this Court cannot overlook the controlling authority of *Cantwell* v. *Connecticut,* supra, unanimously decided by this Court. It was there held that the playing of a phonograph record which violently attacked the Roman Catholic Hierarchy, the governing body of the faith to which the two listeners belonged, was not sufficient reason for abridging the rights of the Cantwells secured by the United States Constitution. In commenting on the conduct of the Cantwells, it is noticed that this Court finds facts identical with the facts in this case. The Court said:

> "We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what

> Cantwell, however misguided others may think him, conceived to be true religion."[13]

In the case at bar the undisputed evidence shows also that there was no truculent conduct, no actual threats of violence of any other improper conduct on the part of Jehovah's witnesses. In this connection we call the Court's attention to the case of *Dearborn Publishing Co.* v. *Fitzgerald,* 271 F. 479, where the court overruled the same argument that the trial court relied upon in this case. The Circuit Court of Appeals sustained a prayer for an injunction in favor of the Dearborn Publishing Company, restraining the mayor of Cleveland, Ohio, from arresting the street distributors of the *Dearborn Independent,* which contained articles of a vicious and scurrilous nature against the Jewish race. The defendants in that case arrested and threatened the arrest of the distributors because there had been mob violence and threatened mob violence between those of the Jewish race, their sympathizers, and the distributors of the literature. The defendants in that case resorted to an ordinance that prohibited the distribution of literature that might tend to or cause a breach of the peace. The United States District Court granted the injunction. As is contended by respondent here, the defendants in that case contended that it was necessary to take action against the distributors to prevent disturbance and to preserve "law and order". However, such contention of public convenience was held not to justify the suppression of the right of freedom of the press, the court saying:

> "If it be assumed that the article might tend to excite others to breaches of the peace the reply is plain. It is the duty of all officials charged with preserving order and peace to suppress firmly and promptly all persons guilty of disturbing it, and not forbid innocent persons to exercise their lawful and equal

[13] See also *People* v. *Downer,* 6 N. Y. S. 2d 566.

rights. . . . If defendants' actions were sustained, the constitutional liberty of every citizen freely to speak, write and publish his sentiments on all subjects, being responsible only for abuse of that right, would be placed at the mercy of every public official who for the moment was clothed with authority to preserve the public peace and the right to a free press thus destroyed."

The sweeping scope of the injunctive decree of the court below specifically violates the federal constitution. It is within the condemnation of a similar injunction announced by this Court in *Near* v. *Minnesota,* supra, where the Court said:

"Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably creates a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. 'To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their character and conduct.'[14] There is nothing new in the fact that charges of reprehensible conduct may create

[14] Report on the Virginia Resolutions, Madison's Works, Vol IV. Pages 543, 549.

> resentment and the disposition to resort to violent means of redress, but this well understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in New Yorkers Staats-Zeitung v. Nolan, 89 N. J. Eq. 387, 388, 105 Atl. 72: 'If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited.' The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a new form of words."

The conclusions reached by this Court in *Milk Wagon Drivers Union, etc.* v. *Meadowmoor Dairies,* supra, cannot be drawn here. On the contrary the facts in the case at bar come clearly within the exception announced by Justice Frankfurter in that case, to-wit:

> " . . . And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force. . . .
>
> " . . . Right to free speech in the future cannot be forfeited because of dissociated acts of past violence. Nor may a state enjoin peaceful picketing merely because it may provoke violence in others. . . .
>
> " . . . Here again, the state courts have not the last say. They must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court."

If the doctrine announced by the Circuit Court of Calhoun County, below, be sustained, then there is no end to which the people would be swept away from their liberties guaranteed by the Constitution. If the injunctive decree can be sustained because it prohibits the distribution of literature on account of the beliefs of the petitioners then *a fortiori* a similar injunction can be granted which restrains the petitioners from walking down the street in the presence of people who know them to be Jehovah's witnesses. A similar decree could be entered enjoining a person from wearing an orange-colored hat on St. Patrick's Day in Boston. The theory sustaining the injunction is that it is to prevent violence. This in effect inters law-abiding citizens and imprisoning them in order to permit the law violators to run loose upon the streets. If the principle of the decision below be extended, then a newsboy could be enjoined from distributing daily papers which carried news which was odious, bad, unpopular or distasteful to certain excitable and unpredictable persons.

We submit that petitioners should have the right to protection from a drunken thug and village tyrant who attempts to sweep the streets of all he dislikes. The State of West Virginia did not afford petitioners this protection. It answered with an injunction, enjoining not the law violators, the one that breached the peace, but rather the petitioners were enjoined from the exercise of their freedoms secured by the fundamental law of the land, while the criminal is left free and unmolested. The decree cannot be sustained.

CONCLUSION

For the reasons above presented, there is presented here a case calling for the exercise by this Court of its supervisory powers under 237(b) of the Judicial Code and Rule 38, paragraph 5 of this Court. To that end the petition for writ of certiorari should be granted so as to correct the

errors complained of and the decree rendered by the Circuit Court of Calhoun County, West Virginia, against these petitioners.

Respectfully submitted,

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